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Supreme Court, U.S.
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No. 99-2035

IN THE

# Supreme Court of the United States

COOPER INDUSTRIES, INC.,

*Petitioner,*

*v.*

LEATHERMAN TOOL GROUP, INC.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF RESPONDENT

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## RULE 29.6 STATEMENT

Respondent Leatherman Tool Group, Inc. certifies that it has no parent corporation nor are there any publicly held companies owning 10% or more of its stock.



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# BRIEF OF RESPONDENT

## STATEMENT OF THE CASE

This case presents the question of the standard by which a federal appeals court should review a district court's ruling on a challenge to the constitutionality of a punitive damages award. In *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989), this Court held that "abuse of discretion" is the proper standard of appellate review of punitive awards in federal court. In *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 434 (1996), this Court held that a federal appeals court should not determine for itself whether a damages award "materially deviates from what is reasonable compensation" but rather should apply only abuse of discretion review. These decisions reflect the fact that tradition, practical concerns, and the Seventh Amendment all militate against any form of de novo or independent review by appellate courts.

Moreover, the record of this case demonstrates that the judgment below should be affirmed under *any* standard of review. The deliberate wrongdoing and multi-million-dollar expected gain in this case amply justify the $4.5 million in punitive damages upheld by the district court.

**1. Background.** Both petitioner Cooper Industries, Inc. ("Cooper") and respondent Leatherman Tool Group, Inc. ("Leatherman") are tool manufacturers. In the fall of 1995, Cooper decided to manufacture and sell a multipurpose tool in competition with Leatherman's well-known Pocket Survival Tool ("Leatherman Tool"). Cooper intended to take 5% of Leatherman's market. "Our take [at] 5% of the Leatherman market should [be] in the $3M range." J.A. 21. Other evidence showed that Cooper anticipated profit margins in excess of 30% and gross profits of approximately $3 million during the first five years of sales. Plaintiff's Trial Exhibit ("Ex.") 72.

Rather than design a tool of its own, Cooper decided to copy the successful Leatherman Tool. Cooper employees were

instructed to purchase a Leatherman Tool because Cooper's would be "the same size, etc." Ex. 96. The Cooper development team even referred internally to its product as the "Cooperman" tool, reflecting its copying of the Leatherman Tool. Pet. App. 44a.

Cooper planned to launch its "ToolZall" at the National Hardware Show ("Hardware Show") in Chicago in August 1996. Ct. App. Excerpts of Record ("ER") 968. The Hardware Show is the most important trade show of the year and is attended by 70,000-90,000 people, including retailers intent on placing orders for new products. Tr. 333, 497, 886. Cooper's plan was to introduce the new ToolZall with considerable fanfare as one of its major new products for the year, using large posters, color brochures, flyers, and media kits. ER 624-26. Cooper scheduled over two dozen advertisements in national print publications from June through November 1996. ER 753; Ex. 66.

Cooper began developing marketing materials in the spring of 1996. With no actual ToolZalls available to create the marketing materials, Cooper constructed a "mock-up" tool by grinding the Leatherman trademark from the handles and pliers head of a Leatherman Tool and replacing the fasteners. J.A. 57-64. Although Cooper has contended that Peter Jones, the Cooper Brand Manager overseeing the project, was unaware that the mock-up was a modified Leatherman Tool, Cooper is wrong. In his deposition, Mr. Jones reluctantly acknowledged that he knew that the mock-up "may include some components from other multifunction tools," including Leatherman's. J.A. 52-56. Mr. Jones forwarded the mock-up to Bill Bliss, Cooper's liaison to its advertising agency, to give to the agency. ER J.A. 65-66. The agency returned the mock-up to Mr. Jones. J.A. 22. Although the Leatherman trademark had been ground off the tool, a curved indentation remained on the pliers head where the trademark had appeared. J.A. 19. To remove this curved mark from a photograph of the mock-up tool, Cooper's ad agency retouched the photograph at the direction of Mr. Jones. J.A. 67-69; Exs. 21-26.



Cooper used the photograph of the barely modified Leatherman Tool (the "Leatherman photograph") in all of its packaging and initial marketing materials, including brochures, catalog pages, press kits, posters and print advertisements. ER 753-56. These marketing materials were prominently displayed and widely distributed at the Hardware Show. ER 622-26. The marketing materials were given to Cooper's sales force for distribution to thousands of vendors who sell to the public and to mail-order catalogs. ER 623-26, 632.

Cooper's use of the Leatherman photograph caused confusion. At the Hardware Show, both Cooper and Leatherman were asked whether Leatherman manufactured the ToolZall for Cooper. ER 719; Tr. 98. Others were confused by Cooper's use of the Leatherman photograph, at and after the show. ER 731-41. Thus, retailers may have placed orders for the ToolZall, believing it was manufactured by Leatherman.

Cooper also used other depictions of the Leatherman Tool to portray its ToolZall. In order to show Cooper's international sales representatives a picture of the ToolZall, Mr. Jones copied a line-art drawing of the Leatherman Tool. He then "whited out" the Leatherman trademark from the drawing, transferred the modified drawing to a computer disk and e-mailed it to foreign representatives as a drawing of the ToolZall. J.A. 43-47; ER 640; Tr. 970.[1]

In September 1996, one month after the Hardware Show, Leatherman filed suit against Cooper alleging trade dress infringement, passing off, and false advertising. While Cooper promptly acknowledged that its marketing materials and packaging displayed a photograph of a modified Leatherman Tool, no immediate action was taken. Cooper waited a full two months, until November 20, 1996, before recalling the misleading marketing materials from its sales personnel. J.A. 23,

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[1] On October 6, 1997, Cooper stipulated to judgment on the copyright infringement claim arising from these acts.

32-36. However, Cooper made an affirmative decision *not* to recall the misleading materials from thousands of vendors, numerous mail-order catalogs, and other recipients. *Id.* Cooper's memorandum to its sales personnel instructed them, in bold type, not to retrieve the marketing materials from Cooper's customers. J.A. 23; ER 905-06.

On December 18, 1996, the district court entered an injunction prohibiting sale of the ToolZall, and on December 20, 1996, Cooper stipulated to an injunction against use of the packaging and marketing materials displaying the Leatherman photograph. J.A. 20. Cooper's decision not to recall the marketing materials resulted in thousands of violations when vendors and mail-order catalogs used the Leatherman photograph to advertise the ToolZall. J.A. 32-41. Following entry of the preliminary injunction, the misleading Leatherman photograph appeared in at least four national publications and in an ad in *The Oregonian* as late as August 1997. ER 1061-69.

At trial in October 1997, Tim Miller, Vice President for Sales and Marketing for Cooper's Hand Tools Division, testified that in March and April 1997 (several months after the preliminary injunction), Cooper's customers printed and distributed thousands of fliers showing the Leatherman photograph. J.A. 36-41. Mr. Miller also testified that there was no way of knowing how many advertisements using the misleading Leatherman photograph were still in circulation. J.A. 38, 40-41. Finally, Mr. Miller confirmed that Cooper made no initial efforts to gather these marketing materials, and did so after many months only because Leatherman insisted. J.A. 33-35.

Refusing to recall the misleading marketing materials was not the only act of culpable indifference by Cooper. In February 1997, two months after the preliminary injunction was entered, Cooper again used the Leatherman photograph, this time to create marketing materials and packaging for foreign markets. J.A. 40. When Leatherman promptly complained, Cooper waited until May 31, 1997, to recall the materials. ER 637-38. Mr. Miller admitted at trial that he did not know how many fliers or



advertisements were distributed throughout the world showing the modified Leatherman Tool. J.A. 40-41.

**2. The District Court's Decision.**

The jury awarded Leatherman $50,000 in compensatory damages on its common-law passing off and false advertising claims. J.A. 17. The award was relatively small no doubt because Leatherman brought suit immediately, forcing Cooper to suspend sales. Leatherman secured a preliminary injunction just four months after the introduction of the ToolZall.

With respect to punitive damages, the jury was instructed – without objection from Cooper[2] – that "Leatherman has the burden of proving by clear and convincing evidence that Cooper acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights." J.A. 14. "In establishing the amount, if any, of punitive damages to award you should consider the following factors:

1. The character of the defendant's conduct that is the subject of Leatherman's unfair competition claims;
2. The defendant's motive;
3. The sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future; and
4. The defendant's income and assets." J.A. 14.

The jury answered a special interrogatory finding that "Cooper acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights." J.A. 18. The jury awarded $4.5 million in punitive damages. *Id.* Pursuant to Oregon law, 60% of this award was

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[2] Cooper objected to an earlier draft instruction and requested that the jury be charged that Leatherman was not entitled to punitive damages on the trade dress claim. The district court amended the instruction as requested by Cooper. Cooper did not object to the final instruction as given.

allocated to the Criminal Injuries Compensation Account of the State of Oregon. Pet. App. 26a.

The excessiveness issue was extensively briefed before the district court on post-trial review under *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996). Cooper submitted no fewer than six post-trial briefs addressing the punitive award. In response, Leatherman demonstrated that the award was entirely reasonable under each of the three guideposts set out in *BMW*. With respect to reprehensibility, Leatherman submitted an extensive catalogue of the record evidence demonstrating that every detail of the ToolZall project was approved by the highest levels of management; that Cooper's use of the photos and drawings of the Leatherman Tool in *all* of Cooper's initial marketing materials showed Cooper's intent and dispelled any notion of accidental use; that Cooper unreasonably delayed before recalling the offending promotional materials from its sales force and affirmatively decided not to recall the materials from vendors, mail order catalogs, and other recipients; that in February 1997, two months *after* the preliminary injunction was in place, Cooper made new advertising flyers for foreign markets, and once against used the improper photograph of the modified Leatherman Tool; that these flyers were circulated extensively in Europe until being recalled on May 31, 1997; and that, as a result of Cooper's dilatory tactics, long after the injunction was entered, U.S. vendors continued to sell Cooper's products using promotional materials depicting the modified Leatherman Tool. Leatherman's Response Brief Regarding Judgment, Equitable Relief, and Punitive Damages, in No. CV-96-1346-MA, at 15-21 (D. Or.) (filed Oct. 31, 1997).

Next, Leatherman showed that the punitive award was reasonably related to actual and potential damages under *BMW*. "Leatherman's actual damages were quite small, despite Cooper's intentional and admitted false advertising." *Id.* at 21. "Cooper failed to realize its projected profits because Leatherman acted promptly to obtain a preliminary injunction. Without an award of punitive damages, Cooper will not suffer at



all." *Id.* at 27. "Under these circumstances, a higher ratio of compensatory damages to punitives is justified." *Id.* at 21. Leatherman argued that this Court's decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993), was highly instructive, because it focused on the potential effects had the illicit scheme succeeded. *Id.* at 46 (plurality opinion). "In this case, one measure of the potential harm is the amount Cooper anticipated in sales and profits from the original ToolZall. Cooper realized from the outset the millions of dollars at stake." Leatherman Br. at 23. "Cooper anticipated profit margins in excess of 30% and gross profits of approximately $3 million during the first five years of sales." *Id.* "The award of $4.5 million is thus certainly within an acceptable range compared to the potential harm Leatherman would have suffered had Cooper succeeded in its wrongful conduct." *Id.*

In addition, Leatherman showed that the punitive award was reasonable in comparison with the civil or criminal penalties that could be imposed for similar misconduct. Oregon statutes provide that anyone found to have willfully engaged in an unlawful trade practice, or to have violated an injunction under the state unfair trade practices act, is subject to a $25,000 penalty *per violation* in a suit brought by the state. *Id.* at 25. "Cooper willfully distributed thousands of depictions of a Leatherman Tool to pass off its ToolZall." *Id.* In addition, "it is clear that there were hundreds if not thousands of violations" of the injunction. *Id.* at 26. "The jury's punitive damages award was thus not out of line with the statutory civil penalties under the UTPA." *Id.*

In the face of this extensive record evidence and briefing by both parties, the district court (Marsh, D.J.) denied Cooper's objection to the punitive award, finding that "the award is fairly proportional given both the nature of the conduct, evidence of intentional use of the modified [Leatherman Tool] and the size of an award necessary to deter future similar conduct given defendant's size and assets." Pet. App. 24a. The district court also rejected Cooper's argument that its remedial steps – taken

only post-verdict, *after* the jury's award – justified a reduction in the damages. The district court explained that "defendant's post-judgment remedial efforts come too late to justify a reduction." *Id.* at 30a.

> Despite the entry of an agreed preliminary injunction relative to defendant's advertising materials depicting the [Leatherman Tool] mock-up, defendant failed to take steps to actually retrieve the materials from vendors and advertisers even though it admitted that its conduct was wrong. Thus, arguably inadvertent violations of the injunctions did in fact take place. It wasn't until the entry of the judgment that defendant was prompted to take the significant steps that it now has implemented to ensure that its actions are not repeated. To allow a reduction in this instance would defeat the purpose of deterrence and would unjustifiably award a defendant who the jury found deserved to be punished for its conduct.

Pet. App. 30a-31a.

**3. The Ninth Circuit Appeal.**

On appeal, Cooper focused primarily on issues *other* than punitive damages, such as its public domain defense and Leatherman's trade dress and attorney's fees claims. The federal excessiveness claim consumed no more than the final 4½ pages of Cooper's 63-page opening brief. In its reply, Cooper devoted a single page to the claim at the end of its 32-page brief. Cooper did not litigate the issue of the appropriate standard of appellate review for excessiveness claims. At oral argument, Cooper did not mention *BMW* or its federal excessiveness claim.

Despite the cursory nature of Cooper's excessiveness claim, the Ninth Circuit (Fogel, D.J., sitting by designation), gave it full consideration. The court of appeals opined:

> The district court specifically found that the punitive damage award was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper's size and assets. *Those findings were supported by the evidence*, such that the award did not violate Cooper's due process rights.



Pet. App. 3a (emphasis added). The Ninth Circuit added that "the jury's finding that Cooper engaged in passing off is supported by *substantial evidence* and is not challenged on appeal." *Id.* (emphasis added). The court remarked that "this is a very unusual passing off case" because any superior qualities of the Leatherman Tool were not perceptible in the photographs. *Id.* "We do not, however, intend to condone the conduct. It was literal passing off and at a minimum, it gave Cooper an unfair advantage by allowing it to use the sweat of Leatherman's efforts to obtain a 'mock-up' more cheaply, easily, and quickly than if it had started from scratch or waited until samples of its own product were ready." *Id.* at 4a. "Additionally, there was evidence that Cooper did not act promptly to remedy the problem even after an injunction issued, which suggests an indifference to legal consequences." *Id.* "Accordingly, the district court did not abuse its discretion in declining to reduce the amount of punitive damages." *Id.*

Thus, although it applied an abuse of discretion label, the Ninth Circuit in fact examined the record and determined that the district court's judgment was supported by "substantial evidence."

## SUMMARY OF ARGUMENT

A federal court of appeals should use an abuse of discretion standard in reviewing a district court order denying a motion for new trial or remittitur on the ground that a punitive damage award is unconstitutionally excessive.

**I.** Historical practice raises grave questions about whether it

is permissible for appellate courts to engage in any review whatsoever of a trial court's denial of an excessiveness challenge to a damages verdict. At common law, there was simply no appellate review for excessiveness of damages. In *Gasperini*, this Court resolved this difficult issue by holding that, so long as the standard of review is confined to "abuse of discretion," appellate review of a district court's judgment regarding excessive damages is reconcilable with the Seventh Amendment. 518 U.S. at 434. But this Court held that a federal appeals court should not determine for itself whether a damages award "materially deviates from what is reasonable compensation." *Id.* Only four years later, petitioner now urges this Court to expand the role of appellate courts by broadening the standard to one of "de novo" or "independent" review. There is no historical basis for such an expansion. The proper level of punitive damages necessary for punishment and deterrence has always been seen as a "fact tried by a jury" for purposes of the Seventh Amendment, just as the proper level of damages necessary to compensate the plaintiff is a question for the jury. This Court's decision in *BMW* v. *Gore* reinforces rather than alters this principle.

**II.** Even apart from tradition and Seventh Amendment concerns, there is no reason to depart from abuse of discretion review. Application of the *BMW* guideposts is an intensely factual, case-specific exercise that is poorly suited to de novo appellate review, particularly when the resources of the federal courts of appeals are already overtaxed. Abuse of discretion review, which encompasses review for legal error, fully vindicates any role those courts need play as expositors of federal law.

There are also powerful practical reasons for an abuse of discretion standard. Excessiveness challenges ordinarily arise in the context of Rule 59 motions, where they are combined with other grounds for new trial, such as evidentiary questions, improper summations, and jury instructions. From a pragmatic standpoint, it makes sense for an appellate court to review the



district court's order under a single, abuse of discretion standard.

**III.** If this Court were to adopt a standard of de novo appellate review, the Court should make clear that such a standard in this context should amount, in practical effect, to the same thing as abuse of discretion review. The relevant question, even under a de novo standard, ought to remain: Is the district court's judgment denying the excessiveness challenge rational, drawing all reasonable factual inferences in its favor?

**IV.** Under any standard of appellate review, the district court's judgment sustaining the punitive damages award in this case should be affirmed. Indeed, the Ninth Circuit has already reviewed the evidence in the record and has concluded that the district court's decision to uphold this punitive award was "*supported by the evidence.*" Pet. App. 3a (emphasis added). The district court's judgment below should thus be affirmed under even de novo appellate review.

## ARGUMENT

### I. ABUSE OF DISCRETION IS THE PROPER STANDARD OF APPELLATE REVIEW OF A TRIAL JUDGE'S RULING ON AN EXCESSIVENESS CHALLENGE TO A PUNITIVE DAMAGES AWARD.

#### A. Historical Practice and Seventh Amendment Concerns Limit Appellate Review to Abuse of Discretion.

In recent years, this Court has repeatedly addressed the issue of judicial review of punitive damages awards and has consistently rejected any form of independent or de novo scrutiny by federal appellate courts. In *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989), this Court opined that "abuse of discretion" was the proper standard of appellate review in federal court. See *id.* at 279 ("The court of appeals should then review the district court's determination

under an abuse-of-discretion standard."). "In performing the limited function of a federal appellate court, we perceive no federal common-law standard, or compelling federal policy, which convinces us that we should not continue to accord considerable deference to a district court's decision not to order a new trial." *Id.* at 279-80. In fact, after holding that the Second Circuit properly determined that the district court did not abuse its discretion in denying a motion for new trial or remittitur on the issue of punitive damages, this Court noted that it would reserve the question whether even a deferential standard such as abuse of discretion review might transgress the Seventh Amendment. *Id.* at 279 n.25 ("We have never held expressly that the Seventh Amendment allows appellate review of a district court's denial to set aside an award as excessive. Although we granted certiorari in two cases in order to consider the issue, in both instances we found it unnecessary to reach the question when we decided the case. In light of the result we reach today, we follow the same course here."). This Court cautioned that "federal courts operate under the strictures of the Seventh Amendment. As a result, we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury." *Id.* at 280 n.26.

In *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), this Court upheld a punitive damages award against a constitutional excessiveness claim, explaining that this Court "more than once has approved the common-law method for assessing punitive awards." 499 U.S. at 15. "[E]very state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process." *Id.* at 18. That common-law method, of course, included highly deferential appellate review of the quantum of damages awarded by juries, including punitive damages.

In *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993), this Court again upheld a punitive damages



award against a constitutional excessiveness challenge. A plurality of this Court expressly rejected the argument that punitive damages verdicts trigger "heightened scrutiny." *Id.* at 456. Assuming that fair procedures were followed, a judgment that is a product of the common-law method for imposing damages, this Court suggested, "is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, or virtually so." *Id.* at 457.

Subsequently, in *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415 (1996), this Court held that a federal appeals court should *not* apply a state-law standard of review prescribed by New York to force closer judicial scrutiny of compensatory damages awards. Instead, this Court opined that the New York law should be applied by federal district courts, and that abuse of discretion was the proper standard of appellate review in federal court. This Court addressed the Seventh Amendment constraint on the power of federal courts to set aside jury verdicts as excessive, explaining that "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late, and less secure, development. Such review was once deemed inconsonant with the Seventh Amendment's Reexamination Clause." *Id.* at 434. Ultimately, this Court held – over the dissent of Justice Scalia, joined by the Chief Justice and Justice Thomas – that "appellate review for *abuse of discretion* is reconcilable with the Seventh Amendment," and that "'[w]e must give the benefit of every doubt to the judgment of the trial judge.'" *Id.* (emphasis added and citation omitted). The dissenters would have held that not even abuse of discretion review by an appeals court is permissible under the Seventh Amendment's Re-Examination Clause.

**1. The Historical Practice Recognized by this Court.**

This Court's repeated unwillingness to approve any form of

appellate review beyond abuse of discretion is well-founded. For 150 years, this Court had held that, under the Seventh Amendment, no appellate review at all of excessiveness challenges was *permissible* – let alone *required*. See 11 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2819, at 204 (2d ed. 1995); Charles Alan Wright, LAW OF THE FEDERAL COURTS § 95, at 682 (5th ed. 1994).

In *Railroad Co.* v. *Fraloff*, 100 U.S. 24 (1879), for example, this Court addressed the question whether alleged excessiveness of a verdict was reviewable on appeal where there was no issue of faulty instructions or other trial error. Justice Harlan explained that appellate review was unavailable:

> Whether [the trial court's] action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.

*Id.* at 31-32. Subsequently, this Court repeatedly reaffirmed the rule that "motions for a new trial based on the ground that the damages allowed by the verdict are excessive" present "purely a question of fact" and that such motions are submitted to the legal discretion of the trial court, which cannot be reviewed. *Metropolitan R. Co.* v. *Moore*, 121 U.S. 558, 574 (1887); see also *St. Louis, I.M. & S.R. Co.* v. *Craft*, 237 U.S. 648, 661 (1915) (proper measure of damages "involves only a question of fact" which is not subject to appellate review). Thus, writing for the Court in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474 (1933), Justice Brandeis was able to declare that "[t]he rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by *a long and unbroken line of decisions*; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were



inadequate. The rule precludes likewise a review of such action by a Circuit Court of Appeals." *Id.* at 481 (emphasis added).[3]

### 2. English Common Law.

The basis for these holdings was the limited nature of common-law appellate review. At common law, the three English courts of record having original jurisdiction – the King's Bench, the Exchequer, and the Court of Common Pleas – all sat at Westminster, but trials were rarely held there. Because of the inconvenience of having jurors and witnesses travel to

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[3] See also *Dimick* v. *Schiedt*, 293 U.S. 474, 489 (1935) (Stone, J., dissenting) (referring to the rule "of the common law, long accepted in the federal courts, that the exercise of judicial discretion in denying a motion for a new trial, on the ground that the verdict is too small or too large, is not subject to review"); *Texas & Pac. R. Co.* v. *Hill*, 237 U.S. 208, 215 (1915) ("the contention that error was committed by the trial court in not directing a remittitur because of the assumed excessive amount of the verdict is not open" to review); *Southern Ry. — Carolina Div.* v. *Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.) ("[A] case of mere excess * * * does not present a question for re-examination here upon a writ of error."); *Herencia* v. *Guzman*, 219 U.S. 44, 45 (1910) ("[T]he objection that the verdict was against the weight of evidence, or that the damages allowed were excessive, cannot be considered."); *Lincoln* v. *Power*, 151 U.S. 436, 437 (1894) (rejecting excessiveness challenge because "it is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury"); *Wilson* v. *Everett*, 139 U.S. 616, 621 (1891) (rejecting excessiveness claim because "this was a question to be reached only through a motion for a new trial; and we cannot, on this writ of error, review any error committed in that respect by the jury"); *New York, L. E. & W. R. Co.* v. *Winter's Adm'r*, 143 U.S. 60, 75 (1892) ("Whether the verdict was excessive is not our province to determine on this writ of error."); *Wabash Ry. Co.* v. *McDaniels*, 107 U.S. 454, 456 (1883) ("That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted."); 4 Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES § 1332, at 2682 (9th ed. 1913) (in federal appeals courts, "the question of excessive damages is not considered, being left entirely to the trial court").

Westminster, under the *nisi prius* system judges from all courts would ride circuit and conduct trials in the local counties.[4] The *nisi prius* trial was limited to issues of fact going to liability and damages; the jury verdicts, along with any exceptions to the instructions or rulings of the *nisi prius* judge, were then returned to the en banc court at Westminster, where they were entered.[5]

At common law, an appeal and a motion for a new trial "were mutually exclusive remedies." *Fairmount*, 287 U.S. at 482 n.9 (citations omitted). An appeal took the form of a "writ of error," which removed the case to a different and higher court and was confined to matters of law.[6] Historically, the writ of error searched only the record of process, pleadings, verdict, and judgment for legal error.[7]

A request for a new trial on excessiveness and other such grounds was made prior to further proceedings and entry of judgment and was "addressed to the discretion of the court in banc" at Westminster. *Fairmount*, 287 U.S. at 482 n.9. The decision was final and subject to no further review as to factual

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[4] W.R. Cornish & G. de N. Clark, LAW AND SOCIETY IN ENGLAND 1750-1950, at 23 (1989); G.R.Y. Radcliffe & Geoffrey Cross, THE ENGLISH LEGAL SYSTEM 90, 183-84 (3d ed. 1954). Most cases were tried in the litigants' county, rather than at Westminster. A.K.R. Kiralfy, POTTER'S OUTLINES OF ENGLISH LEGAL HISTORY 56 (5th ed. 1958).

[5] See generally 1 W.S. Holdsworth, A HISTORY OF ENGLISH COMMON LAW 223-24, 278-82 (2d ed. 1922); Radcliffe & Cross, *supra*, at 90-91, 183-186.

[6] J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 157 (3d ed. 1990); Radcliffe & Cross, *supra*, at 211; Cooley's BLACKSTONE 407, 411 (4th Am. ed. 1899).

[7] Note, *Appealability of Rulings on Motion for New Trial in the Federal Courts*, 98 U. PA. L. REV. 575, 575 (1950); *see also* 3 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 405 (1768) ("The writ of error only lies upon matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it."); *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) (Story, J.).



matters.[8]

Consideration of the motion for new trial was not a form of appellate review. See Baker, *supra*, at 159 (The power to grant new trial was "exercised before judgment, and not by a court of appeal. Once the court in banc had given judgment, the only redress was of the limited kind provided by writ of error.").

"[N]o English court ever set aside * * * a verdict, except with the concurrence of the judge, or judges, who sat with the jury, saw the witnesses, and heard them testify."[9] Thus, "the verdict could be set aside only if the judge who had presided at the trial and heard the witnesses deemed the verdict to be unjustified and, even then, only if he could persuade his brethren at Westminster to this view." Wright & Miller, *supra*, § 2819, at 204.[10]

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[8] Radcliffe & Cross, *supra*, at 211-12 ("one could not appeal against a refusal of the court *in banc* to grant a new trial"); Cooley's BLACKSTONE, *supra*, at 38-45, 57, 58, 391-92.

[9] Maxfield Weisbrod, *Limitations on Trial By Jury In Illinois*, 19 CHI. KENT L. REV. 91, 92 (1940). "An exhaustive examination of the early English cases has revealed not a single case where an English court at common law ever granted a new trial, as being against the evidence, unless the judge or judges who sat with the jury stated in open court, or certified, that the verdict was against the evidence and he was dissatisfied with the verdict." *Id.*; see also 3 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 387 (1768) (new trial would be granted "if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith").

[10] See also John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 213 (1988) (explaining that the King's Bench held that a "new trial would not be granted unless the *nisi prius* judge certified *in writing* that the verdict was against evidence") (emphasis in original). Moreover, the en banc court often refused to acquiesce in the trial judge's recommendation. Baker, *supra*, at 101. The court would not "order a new trial simply because it did not agree with the verdict. If there was no misdirection [of the jury] and there was some evidence on which the verdict could be supported, then it must stand." Radcliffe & Cross, *supra*, at 187. Hence, as late as 1764 the Court of Common Pleas was able to say that "there is not one single case (that is law)

### 3. The Seventh Amendment.

At common law there was no appellate review at all of excessiveness of damages and other factual issues. It would be remarkable, therefore, to hold today that de novo or independent review is somehow legally required. The historical record is also significant because of the command of the Seventh Amendment: "[I]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and *no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*" (emphasis added). Justice Story described the italicized Re-Examination Clause as "more important" than the preceding portion of the Amendment. *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). The Clause "not only preserves th[e jury trial] right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under the common law." *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935); see also *Colgrove* v. *Battin*, 413 U.S. 149, 155 n.6 (1973). The Seventh Amendment "requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or it itself such prerogative." *Walker* v. *New Mexico R.R. Co.*, 165 U.S. 593, 596 (1897).

The Seventh Amendment was adopted principally to protect jury verdicts from after-the-fact judicial interference, especially by appellate courts. Hon. Patrick Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 50 (1977). "[T]he entire issue of the absence

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in all the law books to be found, where the Court has granted a new trial for excessive damages in cases of torts." *Beardmore* v. *Carrington*, 95 Eng. Rep. 790, 793 (C.P. 1764); see also *Duberly* v. *Gunning*, 100 Eng. Rep. 1226, 1228 (K.B. 1792) ("the Court [has] never granted a new trial in such a case as this for excessive damages").



of a bill of rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases." Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 657 (1973).

The Re-Examination Clause was inserted into the Seventh Amendment specifically to address the "problem of appellate review of questions of fact." *Id.* at 727; see also *The Justices* v. *Murray*, 76 U.S. (9 Wall.) 274, 281 (1870) (Seventh Amendment adopted to allay "the apprehension and alarm in respect to the appellate jurisdiction of this court over cases tried by a jury"). In *Parsons*, Justice Story held that a trial court did not err in refusing to transcribe testimony, which the petitioner sought "in order to establish the error of the verdict in matters of fact." 28 U.S. at 445. Justice Story explained that the application was immaterial because the Re-Examination Clause prohibited appellate review of such factual questions. *Id.* at 446-48.

Although this Court has indicated in *Gasperini* that abuse of discretion review by an appellate court is consistent with the Seventh Amendment, the Court should go no further. Expansion of appellate review to a standard of de novo or independent review would represent the very kind of review that this Court held in *Gasperini* should *not* be performed by federal appellate courts. Moreover, such expansion would be utterly inconsistent with traditional judicial practice and would raise very serious questions under the Seventh Amendment.

### B. These Limitations Are Fully Applicable to Punitive Damages.

Petitioner seeks to distinguish *Gasperini* and the historical tradition of narrow appellate review by attempting to draw a sharp distinction between compensatory and punitive damages. But the proper amount of punitive damages – the amount necessary for punishment and deterrence – has always been seen as a "fact tried by a jury" for purposes of the Seventh

Amendment, just as the proper amount of damages necessary to compensate the plaintiff is a question for the jury.

This Court explained some 150 years ago that, "where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff * * * something farther by way of punishment or example, which has sometimes been called 'smart money.' *This has always been left to the discretion of the jury.*" *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1852) (emphasis added). In *Missouri Pacific Railroad Co.* v. *Humes*, 115 U.S. 512 (1885), this Court held that assessment of punitive damages is committed to "[t]he discretion of the jury" and "the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice." *Id.* at 521. In *Barry* v. *Edmunds*, 116 U.S. 550 (1886), this Court opined that, in cases of exemplary damages, "it is the peculiar function of the jury to determine the amount by their verdict," and any other approach would "encroach[] upon the province of the jury." *Id.* at 565.[11]

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[11] See also G. Field, LAW OF DAMAGES 65 (1876) ("[T]he amount of damages by way of punishment or example are necessarily largely within the discretion of the jury; the only check * * * being the power of the court to set aside the verdict where it is manifest that the jury were unduly influenced by passion, prejudice, partiality, or corruption, or where it clearly evinces a mistake of the law or of the facts in the case."); *id.* at 73-74 ("'It is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in tort, and which all mankind must at first blush think so, to induce a court to grant a new trial for excessive damages.'") (citation omitted); C.T. McCormick, HANDBOOK ON THE LAW OF DAMAGES § 85, at 296 (1935) ("It is usually held that the amount of exemplary damages lies within the discretion of the jury, subject to review by the court only in cases of such abuse as indicates the influence of passion or prejudice."); Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES 521-22 (4th ed. 1868) ("[T]he jury may, if they think proper, give vindictive damages. * * * [W]here circumstances of aggravation are made apparent, where the motive of the defendant is grossly fraudulent, malicious, or oppressive, the amount of relief is left largely to the discretion of the jury."); *id.* at 545 ("where circumstances of aggravation are proved, the jury are the necessary as well as the rightful judges of the amount of relief"); 1 Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES § 388, at 755 (9th ed. 1913) ("The amount of exemplary damages is generally said to be entirely within the discretion of the jury."); 4 Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES § 1318, at 2659 (9th ed. 1913) ("the allowance and amount of exemplary damages is a question for the jury"); 1 J.G. Sutherland, A TREATISE ON THE LAW OF DAMAGES 742 (1883) ("Whether [exemplary damages] shall be allowed, and their amount, are left to the discretion of the jury."); 3 J.G. Sutherland, A TREATISE ON THE LAW OF DAMAGES 661 (1883) ("The amount of damages in these cases, both compensatory and exemplary, are in the discretion of the jury; and being so, the verdict must be palpably and grossly excessive to induce the court to set it aside."); 2 J.G. Sutherland, A TREATISE ON THE LAW OF DAMAGES § 459, at 1493 (4th ed. 1916) ("It is the peculiar province of the jury to decide such cases under appropriate instructions from the court; and the law does not recognize in the latter the power to substitute its own judgment for that of the jury."); *Sheik* v. *Hobson*, 64 Iowa 146, 148 (1884) ("the question whether punitory damages shall be assessed, and the amount of their assessment, is left to the discretion of the jury"); *Respass* v. *Parmer*, 2 A.K. Marsh. 365, 365 (Ky. 1820) ("In torts the jury are the exclusive judges of the damages."); *New Orleans, J. & Great N.R. Co.* v. *Hurst*, 36 Miss. 660, 666 (1859) (exemplary damages are committed to the jury's "discretion," and "[i]t is not enough that, in the opinion of the court, the damages are too high"); *McWilliams* v. *Bragg*, 3 Wis. 424, 427 (1854) ("the jury were the proper judges of the damages").



In *Haslip*, 499 U.S. at 15-17, this Court reaffirmed *Day*, *Humes*, and *Barry*. In *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), this Court again recognized the "primacy of the jury in the awarding of damages," *id.* at 353, including exemplary or punitive damages.[12]

*Gasperini* itself rejected the distinction petitioner proposes between compensatory and punitive damages. There, this Court relied extensively on *Browning-Ferris*, while noting that "*Browning-Ferris* concerned punitive damages." 518 U.S. at 435 n.18. "'[T]he question whether an award of compensatory

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[12] *Tull* v. *United States*, 481 U.S. 412, 425-26 & n.9 (1987) (cited at PLAC Br. 25 n.10, RR Br. 11), is not to the contrary. *Tull* involved a civil penalty action under the Clean Water Act, not a common-law claim for punitive damages. Moreover, *Tull* was severely limited, and indeed called into question, by *Feltner*. See 523 U.S. at 354-55 & n.9.

damages exceeds what is permitted by law is not materially different from the question whether an award of punitive damages exceeds what is permitted by law.'" *Id.* (citation omitted).

In addition, at least some of the cases establishing the longstanding Seventh Amendment prohibition against *any* appellate review of a trial court's denial of an excessiveness challenge (see note 3, *supra*) included an apparent exemplary or punitive component. *E.g.*, *New York, L. E. & W. R. Co.* v. *Winter's Adm'r*, 143 U.S. 60 (1892) ($10,000 for railroad passenger arbitrarily put off train in mid-journey).

These cases reflect the fact that petitioner's proposed distinction between compensatory and punitive damages is not simply hard to maintain in practice; it is flawed at the core. At common law, there was no relevant distinction between the judicial treatment of punitive damages and the treatment of other kinds of damages in torts cases. See, *e.g.*, 1 Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES § 388, at 756 (9th ed. 1913) ("The power of the court to set aside a verdict for exemplary damages is the same power, and is exercised upon the same principle, as in any case of excessive verdict."). In fact, the very genesis of punitive damages rebuts petitioner's argument: punitive damages emerged as a substitute species of damages in cases where society's interest in deterrence and retribution were not fulfilled by the compensatory damages available to the plaintiff. See *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting) (Punitive damages "came at a time when compensatory damages were not available for pain, humiliation, and other forms of intangible injury. Punitive damages filled this gap.").

For example, in *Wilkes* v. *Wood*, 98 Eng. Rep. 489 (C.P. 1763), the victim of an illegal search requested a supplement to his damages on the ground "that trifling damages would put no stop at all to such proceedings," *id.* at 490, and received £1,000 after Lord Chief Justice Pratt explained to the jurors that they "have it within their power to give damages for more than the injury received. Damages are designed not only as a satisfaction



to the injured person, but likewise as a punishment to the guilty, to deter any from proceeding in the future, and as a proof of the detestation of the jury to the action itself." *Id.* at 498-99 (emphasis added). "In England, where exemplary damages had their origin, it is still not entirely clear whether the accepted theory is that they are a distinct and strictly punitive element of the recovery, or they are merely a swollen or 'aggravated' allowance of compensatory damages permitted in cases of outrage." C.T. McCormick, HANDBOOK ON THE LAW OF DAMAGES § 78, at 278 (1935).[13]

In the United States, punitive damages followed the same evolutionary path as in England. One of the first courts to entertain a punitive damages case instructed the jury "not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example's* sake, to prevent such offences in the future." *Coryell* v. *Colbaugh*, 1 N.J.L. 77, 77 (1791); see also *Edwards* v. *Beach*, 3 Day 447, 450 (Conn. 1809) (amount of injury to property "is not the only ground of damages"; were it so, "a person so disposed might forcibly dispossess another of article of property at his pleasure, and compel the owner * * * to accept of the value in its stead"). In

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[13] In *Huckle* v. *Money*, 95 Eng. Rep. 768 (C.P. 1763), the court approved an award of damages of £300 to a journeyman printer falsely imprisoned for six hours by an official who "used him very civilly by treating him with beefsteaks and beer, so that he suffered very little or no damages." *Id.* at 768. In *Sears* v. *Lyons*, 171 Eng. Rep. 658 (K.B. 1818), the court instructed the jury that it was not limited to "the mere pecuniary damage sustained by the plaintiff" when the defendant acted with malice in destroying his property. *Id.* at 658; see also *Hewlett* v. *Cruchley*, 128 Eng. Rep. 696, 697 (K.B. 1813) (£2,000 verdict for malicious prosecution where out-of-pocket costs were £100); *Bruce* v. *Rawlins*, 95 Eng. Rep. 934, 934 (C.P. 1770) (£100 for illegal search that "did little or no damage"); *Benson* v. *Frederick*, 97 Eng. Rep. 1130, 1130 (K.B. 1766) (£150 for whipping, even though the plaintiff was "not hurt much indeed"); *Tullidge* v. *Wade*, 95 Eng. Rep. 909, 909 (C.P. 1769) (although plaintiff's loss was no more than 20 shillings, verdict of £50 upheld, and "[i]f the jury had given £100 damages, [the judge] should not have thought them too much").

fact, many states continue to follow the rule that punitive damages may be awarded expressly to provide additional compensation to the plaintiff.[14]

Hence, the proper amount of punitive damages must be considered a "fact tried by a jury" under the Seventh Amendment.

### C. *BMW* v. *Gore* Supports Deferential Appellate Review.

#### 1. *BMW* Embraced Common-Law Precedent.

This Court's decision in *BMW* v. *Gore* confirms the appropriateness of deferential appellate review. *BMW* embraced rather than rejected common-law precedent regarding punitive damages. This Court distilled three "guideposts" (517 U.S. at 574) from common-law cases; it did not legislate them from whole cloth. Significantly, the same common-law tradition also established an extremely limited standard as the proper test for appellate review. As petitioner's own amicus states, *BMW* "never intimated that these guideposts were unique to a due process inquiry; to the contrary, it suggested that they were the traditional indicia of the reasonableness of an award." RR Br. 12.

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[14] See C.T. McCormick, HANDBOOK ON THE LAW OF DAMAGES § 78, at 279 (1935) (some states "approximate the English view" and regard punitive damages "not as punishment but as extra compensation for injured feelings or sense of outrage"); Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1085 (1989); *Continental Cas. Co.* v. *Fibreboard Corp.*, 762 F. Supp. 1368, 1376 (N.D. Cal. 1991); *Tedesco* v. *Maryland Cas. Co.*, 18 A.2d 357, 358 (Conn. 1941); *Bourgeois* v. *State Farm Mut. Auto. Ins. Co.*, 562 So. 2d 1177, 1179 (La. Ct. App. 1990); *Creech* v. *Aetna Cas. & Sur. Co.*, 516 So. 2d 1168, 1173 (La. Ct. App. 1987), *writ denied*, 519 So. 2d 128 (1988); *Kewin* v. *Massachusetts Mut. Life Ins. Co.*, 295 N.W.2d 50, 55 (Mich. 1980); *Transportation Ins. Co.* v. *Moriel*, 814 S.W.2d 144, 150 (Tex. Civ. App.– El Paso 1991); *Hofer* v. *Lavender*, 679 S.W.2d 470, 474-75 (Tex. 1984).



In order to establish the significance of the reprehensibility guidepost, for example, the *BMW* Court relied on *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1852), and *St. Louis, I.M. & S.R. Co.* v. *Williams*, 251 U.S. 63, 66-67 (1919). See *BMW*, 517 U.S. at 575. Next, this Court observed that "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree," citing several nineteenth-century decisions,[15] as well as 65 enactments in common-law England during the period between 1275 and 1753 providing for double, treble, or quadruple damages to establish a ratio factor. *Id.* at 580-81; see also *TXO*, 509 U.S. at 459 ("state courts have long held that 'exemplary damages allowed should bear some proportion to the real damage sustained'") (citations omitted); *id.* at 476-78 & nn.1-2 (O'Connor, J., dissenting) (describing common-law restrictions on damages awards).

*BMW* v. *Gore* rejected any suggestion that the constitutional standard of excessiveness was a newly minted, bright-line test divorced from prior common-law approaches to assessing punitive damages awards: "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula." 517 U.S. at 582. We "reiterate our rejection of a categorical approach. Once again, we return to what we said * * * in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness * * * properly enter[s] into the constitutional calculus.'" *Id.* at 582-83 (quoting 499 U.S. at 458). This Court emphasized the latitude that States have in

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[15] 517 U.S. at 580 n.32 (citing *Grant* v. *McDonogh*, 7 La. Ann. 447, 448 (1852); *Saunders* v. *Mullen*, 66 Iowa 728, 729, 24 N.W. 529 (1885); *Flannery* v. *Baltimore & Ohio R. Co.*, 15 D.C. 111, 125 (1885); *Houston & Tex. Cent. R. Co.* v. *Nichols*, 9 Am. & Eng. R.R. Cas. 361, 365 (Tex. 1882); *McCarthy* v. *Niskern*, 22 Minn. 90, 91-92 (1875)).

imposing punitive damages. "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests [in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." 517 U.S. at 568. And this Court cautioned that the excessiveness factors are only guidelines: "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Id.* at 582; see also *id.* at 585 ("we are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award").

The principal opinion in this Court's decision in *TXO* – authored by the same Justice who delivered the opinion for the Court in *BMW* v. *Gore* – illustrates that the test for constitutional excessiveness cannot be applied in mechanical fashion. In *TXO*, this Court expressly rejected a proposed test of certain "objective" criteria for punitive damage awards.[16] Instead, this Court in *TXO* upheld a punitive award that was 526 times the compensatory damages: "both State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages." 509 U.S. at 460. This Court examined the traditional function of punitive damages to punish and deter and considered evidence suggesting that the potential loss to the plaintiffs amounted to several million dollars, thus justifying a punitive award of $10 million.

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[16] See 509 U.S. at 457 ("Nor are we persuaded that reliance on petitioner's 'objective' criteria is the proper course to follow. • • • We question, however, the utility of such a comparative approach as a test for assessing whether a particular punitive award is presumptively unconstitutional."); *id.* at 458 ("we are not prepared to enshrine petitioner's comparative approach in a 'test' for assessing the constitutionality of punitive damages awards").



Hence, *TXO* demonstrates that the constitutional standard of excessiveness must be understood in the context of the common-law tradition surrounding punitive damages.

Further, the *TXO* plurality made clear the limited nature of the due process right involved: "we do not suggest that a defendant has a substantive due process right to a correct determination of the 'reasonableness' of a punitive damages award." *Id.* at 458 n.24. Rather, this Court opined that the due process right involved was nothing new: "our cases have recognized for almost a century that the Due Process Clause of the Fourteenth Amendment imposes an outer limit on such an award." *Id.*

Indeed, the same arguments as petitioner makes for de novo appellate review could have been made before *BMW*. Even under common-law standards of excessiveness, judicial review of a motion for new trial or remittitur required the trial court to determine an upper threshold of damages beyond which any damages would be considered as a matter of law to be excessive, or "monstrous," or "shocking" to the conscience. Nonetheless, a trial court's judgment deciding whether the verdict exceeded the upper limit of permissible damages was never thought to authorize appellate review – let alone de novo, independent appellate review – of the trial court's decision.

The point is also confirmed by *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), where this Court addressed a provision of the Oregon Constitution stating that "*no fact tried by a jury* shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict." *Id.* at 427 n.5 (emphasis added). This Court took the provision to mean that, "if the defendant's only basis for relief is the *amount* of punitive damages the jury awarded, Oregon provides no procedure for reducing or setting aside that award." *Id.* at 426-27. The Court accordingly held Oregon law inconsistent with due process insofar as it barred all federal constitutional claims that particular punitive damages verdicts were excessive. Quite plainly, unless this Court deemed the

proper size of a punitive damages award to be a "fact tried by a jury," in the context of a federal constitutional claim that the damages were excessive, the challenged provision of the Oregon Constitution would not have been triggered, and this Court would have had to affirm the judgment in *Honda Motor Co.* v. *Oberg*.

As shown by *Oberg*, the constitutional standard of excessiveness is a continuation, rather than a repudiation, of common-law punitive damages excessiveness analysis – a tradition that also included extremely limited appellate review.

### 2. Constitutional Excessiveness Review Involves Facts Found By the Jury.

Petitioner contends that the *BMW* guideposts "transcend anything the jury considered, or should have considered, in reaching its verdict." Pet. Br. 14. That is not so. This Court has long urged that juries be given detailed instructions to confine their discretion as to punitive damages and that the governing standards not be reserved solely for post-verdict review. *E.g.*, *Haslip*, 499 U.S. at 52 (O'Connor, J., dissenting). Accordingly, the *BMW* guideposts themselves are often incorporated within jury instructions.[17] But even if they are not, post-verdict review

[17] Some lower courts have noted the Seventh Amendment Re-Examination issues raised in federal court by a reassessment of the jury's award according to legal standards that the jury was not given an opportunity to consider. *E.g.*, *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 110 (4th Cir. 1991); *Geressy* v. *Digital Equip. Corp.*, 950 F. Supp. 519, 521 (E.D.N.Y. 1997) ("If the jury is to accomplish its task under the Seventh Amendment, it is entitled to be informed of its role."). "It is a commonplace that a jury verdict must be reviewed in relation to the record before it." *TXO*, 509 U.S. at 469 (Kennedy, J., concurring). At common law, a jury was entitled to consider all "the facts and circumstances connected with the wrong, showing the degree of malice and the results of the wrong," G. Field, LAW OF DAMAGES 102 (1876), and the verdict was not subsequently re-examined by courts according to factors the jury had not been allowed to consider. In this case, although the jury was not



under the *BMW* guideposts does not eliminate the essentially fact-dependent nature of the punitive damages inquiry. Determining whether a particular award is a reasonable form of punishment or deterrence requires that one first determine the nature of the wrongdoing and its degree of reprehensibility; the extent of the harm or potential harm threatened by the defendant's misconduct; and a host of other intensely factual matters. All of this requires reviewing the facts of the case. Whether a post-verdict review also entails application of a legal standard with which the jury has not been instructed, what is necessarily *also* required is review of an intensely factual question.

The *BMW* guideposts are inexorably tied up within the jury's verdict. "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575. This factor is likely to be at the heart of the jury's verdict: whether the defendant knew or suspected that its conduct was unlawful or instead had a good-faith belief that it was acting legally; whether the defendant made deliberately false statements; and whether the defendant "has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful." *Id.* at 576-77 (noting that "repeated misconduct is more reprehensible than an individual instance of malfeasance").

Similarly, determining whether the punitive damages awarded bear a reasonable relationship to compensatory damages entails a highly factual inquiry, involving matters resolved by the jury. As this Court recognized in *BMW*, this factor will often require an analysis of "actual harm as determined by the jury." 517 U.S. at 582. In other cases, a court will have to pore over the facts of a case to assess whether "a particularly egregious act has resulted in only a small amount of economic damages" or whether "the

instructed on the *BMW* guideposts *in haec verba*, Cooper neither objected to the jury instructions nor appealed the issue.

injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Id.* The defendant's expected gain and the plaintiff's potential loss are intensely factual issues, as illustrated by *TXO*, 509 U.S. at 462, which involved close scrutiny of the record evidence before the jury to resolve the disputed value of an expected stream of future natural gas royalties.

Even the application of the third guidepost – sanctions for comparable misconduct – will depend largely on the particular facts of a given case as found by the jury. In practice, the focus of the parties' disagreement will not be a *legal* dispute over how a statutory penalty or criminal provision should be interpreted in the abstract, but a *factual* dispute over whether the defendant's conduct is "similar" to the "malfeasance" punished by the legislative sanction. *BMW*, 517 U.S. at 584. For example, in *BMW* this Court noted that "some statutes draw a distinction between first offenders and recidivists." *Id.* Plainly, the parties are less likely to dispute the meaning of such statutes than they are the factual question of whether the defendant qualifies as a "recidivist."

Hence, constitutional excessiveness review involves matters placed before, and resolved by, the jury. As Justice Kennedy has observed in the context of excessiveness challenges, "the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" *Haslip*, 499 U.S. at 41-42 (opinion concurring in judgment) (internal citation omitted).

### 3. *BMW* Itself Invoived Deferential Review.

Petitioner also contends that support for its standard of de novo appellate review is provided by the manner in which this Court reviewed the punitive award in *BMW*. To the contrary: this Court in *BMW* applied a deferential standard of review



regarding disputed issues of fact. This Court indicated that it would "assume, as the juries in this case and in the *Yates* case found, that the undisclosed damage to the new BMWs affected their actual value." 517 U.S. at 585. This Court deferred to the jury's finding "[n]otwithstanding the evidence adduced by BMW." *Id.*; see also *id.* at 579-80 ("We accept, of course, the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State."). The phrase "de novo" never appears in the *BMW* opinion, and this Court never suggested that it was undertaking an "independent" review of the record.

Moreover, *BMW* v. *Gore* arose in state court, as did *Haslip* and *TXO*, where the restrictions of the Seventh Amendment do not apply. *E.g.*, *Walker* v. *Sauvinet*, 92 U.S. 90, 92 (1876). Hence, there was no Seventh Amendment constraint on the ability of the state appellate courts in *BMW*, *TXO*, and *Haslip* to review the punitive damages awards. Federal courts, by contrast, are bound by the restrictions of the Seventh Amendment, including its Re-Examination Clause. This Court has recently held, in the context of an excessiveness challenge to a damages award, that the Seventh Amendment precludes a federal appellate court from ordering a remittitur, "according to its own estimate of the amount of damages which the plaintiff ought to have recovered," without affording the plaintiff the option of a new trial. *Hetzel* v. *Prince William County*, 523 U.S. 208, 211 (1998) (per curiam) (internal citation omitted).

Hence, tradition plainly marks abuse of discretion review as the maximum standard a federal appellate court should apply. Nothing about the nature of judicial review in state-court cases such as *Haslip*, *TXO*, or *BMW* justifies de novo or independent appellate review of punitive damage awards in cases governed by the Seventh Amendment.

## II. THERE IS NO REASON TO DEPART FROM THE ABUSE OF DISCRETION STANDARD.

Petitioner shoulders a heavy burden in urging this Court to depart from the historic tradition of narrow appellate review of excessiveness questions. This Court has held that "a long history of appellate practice" or "a historical tradition" may establish the proper standard of review. *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988). That is the case here.

Further, application of the *BMW* guideposts is an intensely fact-dependent exercise that is ill-suited to de novo appellate review, particularly when the resources of the federal courts of appeals are already overtaxed. Moreover, any role for those courts as expositors of uniform federal law is fully accommodated by abuse of discretion review, which encompasses review for legal error. Hence, even if this Court were to focus solely on institutional concerns – whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question," *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985) – those factors militate in favor of at most abuse of discretion review.

Petitioner's standard of de novo review is thinly disguised tort reform from the bench – a characterization underscored by the array of amici supporting petitioner – and is designed to give a defendant an unfair advantage in the form of two bites at the apple. First, at the trial court level, a disgruntled litigant can request the trial judge to set aside the verdict as excessive, or alternatively, grant a new trial. Second, under petitioner's view, the losing defendant would be able to appeal the decision, even in the absence of any error of law by the trial judge, and seek a de novo review of the jury verdict and the district court's decision by an appellate court. There is no basis in law for such an unfairly skewed procedure – a procedure whose logic would encompass as many repetitions of de novo review as the system, for its own institutional reasons, happens to provide layers of appeal.



### A. District Courts Are Better Situated Than Appellate Courts to Review Punitive Awards.

Even in the criminal context, where the right to liberty rather than mere money damages is at stake, this Court has held that abuse of discretion is the proper standard for fact-intensive determinations by district courts. In *Koon* v. *United States*, 518 U.S. 81 (1996), this Court held that a district court decision to depart from the Guideline sentencing range should be reviewed on appeal for abuse of discretion rather than de novo. Even though the Guidelines prescribe detailed factors to constrain a district court's discretion and are aimed at producing uniformity among sentencing decisions by different courts, this Court held that the Guideline's purpose of reducing "unjustified disparities in sentencing" did not justify de novo review. *Id.* at 96. "[T]he district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Id.* at 98. This Court noted a "district court's special competence – about the 'ordinariness' or 'unusualness' of a particular case," and the need to recognize "the reactions of the trial judge to the fact-specific circumstances of the case." *Id.* (citation omitted). This Court rejected the argument – identical to that advanced by petitioner here – that questions of appropriate punishment can best be resolved in the rarified atmosphere of an appellate court, abstracted from the factual details of the case with which the district court is most familiar:

> The Government seeks to avoid the factual nature of the departure inquiry by describing it at a higher level of generality linked closely to questions of law. * * * [But] it does not advance the analysis much to determine that a victim's misconduct might justify a departure in some aggravated assault cases. What the district court must determine is whether the misconduct that occurred in the particular instance suffices to make the case atypical. The

> answer is apt to vary depending on, for instance, the severity of the misconduct, its timing, and the disruption it causes. These considerations are factual matters.

518 U.S. at 99-100.

This reasoning is squarely applicable here.

### 1. The *BMW* Guideposts Are Fact-Intensive.

The constitutional excessiveness inquiry under the *BMW* guideposts is a highly fact-intensive, context-specific process. Because a court "cannot draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," *Haslip*, 499 U.S. at 18, the excessiveness inquiry involves a determination whether the award falls within a range of possible acceptable awards. There is rarely any single "right" answer as to the proper quantum of punitive damages. The question is therefore whether the judgment entered by the trial court falls within the zone of reasonableness. See *BMW*, 517 U.S. at 568 (whether award falls within "the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment"). The excessiveness inquiry, like other issues suited for deferential review, has "furry edges." Ronald Dworkin, TAKING RIGHTS SERIOUSLY 22 (1977). By its nature, such a question lends itself to an abuse of discretion rather than a de novo standard. Given the superior vantage point of the district court regarding the factual context of the case, there is no warrant for de novo appellate review.

As a plurality of this Court explained in *TXO*, punitive damages awards "are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." 509 U.S. at 457. In *Haslip*, this Court noted that punitive awards "must depend on the peculiar



circumstances of each case." 499 U.S. at 16 (internal quotation omitted).

This case illustrates that the *BMW* guideposts are highly fact-specific, and their proper application demands close familiarity with the factual record of a case. Here, the defendant's intent and (alleged) good faith was central to the reprehensibility issue. The trial judge, having seen and heard the witnesses testify and be cross-examined, is obviously better able to discern the defendant's state of mind, evaluate demeanor and credibility, and resolve the factual disputes upon which application of the *BMW* guideposts depends.

Cooper argues that the excessiveness test entails nothing more than a mechanical application of undisputed or otherwise established facts to the governing constitutional principles. But this argument ignores the reality that reprehensibility, expected gain, potential harm, and other relevant variables turn on nuanced issues of fact, which are typically vigorously disputed. An appellate court would have no special insight into these factors on a cold record. Again, this very case illustrates the point. Before this Court, petitioner and its amici attempt to relitigate the jury's verdict and the trial judge's decision. See Pet. Br. 5 (arguing that Cooper acted "[u]pon being alerted to the situation"); Chamber Commerce Br. 3 (Cooper's conduct warranted punishment "by only the barest of margins"). Petitioner's own strategy before this Court shows that the application of the *BMW* guideposts cannot realistically be reduced to an antiseptic or mechanical exercise performed by appellate judges with no first-hand familiarity with the facts of the case.

### 2. Appellate Courts Have No Special Expertise that Would Warrant De Novo Review.

While in some circumstances the courts of appeals play the principal role in ensuring the uniform application of legal rules to particular sets of facts, see, *e.g.*, *Ornelas* v. *United States*, 517

U.S. 690, 697-98 (1996) (defining probable cause and reasonable suspicion), the application of the *BMW* guideposts is not such a situation. "District courts have an institutional advantage over appellate courts" in applying these guideposts, because they see many more civil tort cases than appellate courts do. *Koon*, 518 U.S. at 98. An appellate panel has no first-hand experience with torts trials, or even criminal trials, and its information will be limited to prior reported decisions.

Contrary to petitioner's claim (Pet. Br. 16), a court of appeals is not in a better position to conduct comparative excessiveness review or to determine how a particular case ranks among other punitive damages cases. What is most relevant to comparative review is an in-depth understanding of the factual nuances of the individual case, which a district court enjoys by virtue of its first-hand vantage point. Armed with this knowledge, the district court will be able to place a case in context according to the degree of the defendant's reprehensibility and the other *BMW* guideposts.

Accordingly, nothing beyond an abuse of discretion standard is indicated by the value of policing punitive awards to ensure comparability and proportionality. As this Court explained in *Gasperini*, in the course of holding that federal appellate courts should not decide for themselves whether a damages award "materially deviates from what is reasonable compensation," "[w]ithin the federal system, practical reasons combine with Seventh Amendment constraints to lodge in the district court, not the court of appeals, primary responsibility for application of [New York's] 'deviates materially' check." 518 U.S. at 438. "Trial judges have the 'unique opportunity to consider the evidence in the living courtroom context,' while appellate judges see only the 'cold paper record.'" *Id.* (citation omitted); see also *id.* at 448 (Stevens, J., dissenting) ("As a matter of federal-court administration, we have recognized in other contexts the need for according some deference to the lower court's resolution of legal, yet fact-intensive, questions.").

Further, the abuse of discretion standard fully accommodates



the role of the appellate courts as expositors of federal law because it encompasses review for legal error. See *Koon*, 518 U.S. at 100 ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."); *Gasperini*, 518 U.S. at 448 (Stevens, J., dissenting) ("it is a familiar, if somewhat circular, maxim that deems an error of law an abuse of discretion"); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 402, 405 (1990) (same). Abuse of discretion review therefore gives the courts of appeals ample opportunity to ensure the proper development of constitutional principles regarding excessiveness. Where an appellate court holds that it was an abuse of discretion for a district court to rely on certain incorrect legal conclusions, it advances the clarity of the law just as much as if it had reversed the district court after conducting de novo review.

Petitioner further asserts that de novo review is appropriate to enable judges on the courts of appeals to develop and draw upon accumulated experience with punitive damages cases. Pet. Br. 15-16. This claim is utterly fanciful, for relatively few punitive damages cases are appealed in the federal courts. According to petitioner's amicus General Dynamics, federal appellate courts have heard only 19 punitive excessiveness cases in the nearly five years since *BMW* was decided where the challenged award was $1 million or more. See Gen. Dynamics Br. (appendix). By comparison, there are 141 circuit judges on the regional courts of appeals, with an additional 76 senior circuit judges. The notion that, under de novo review, appellate judges will develop the kind of individual expertise that petitioner supposes is therefore without any foundation. The tip of the iceberg that a court of appeals judge sees, moreover, may not be a reliable cross-section of cases, for it will undoubtedly involve matters in which the appellant believes that the facts are aberrant and therefore make a more appealing case for correction by the higher court.

The costs of petitioner's proposal to the already overburdened federal courts of appeals would be staggering. For de novo

review would require those courts to engage in time-consuming examination of usually voluminous and sometimes mammoth district court records. Given "overloaded dockets [that] threaten the federal appellate system," *Behrens* v. *Pelletier*, 516 U.S. 299, 322 (1996) (Breyer, J., joined by Stevens, J., dissenting), an appellate standard of independent review is highly inadvisable. Burdening the courts of appeals with de novo review will make it even more difficult for them to craft well-written opinions articulating the courts' reasoning and contributing to the development of the law. The Administrative Office of the U.S. Courts has warned that "[f]ederal judges have seen their caseload and associated workload rise significantly over the past five years."[18] Cases filed in the courts of appeals have increased 9.2% since 1995, while the number of cases pending has increased by 13.3%.[19] Vacancies on the courts of appeals are a matter of growing concern. The Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by Justice White, concluded:

> By any measure, the courts of appeals of today are handling more cases, and more work, than their predecessor courts. With only brief respites after new judgeship bills took effect, circuit judges have been faced with relentlessly increasing caseloads since the beginning of the upswing in appeals in the 1960s. * * * Since 1960, circuit judgeships have grown by roughly 160%, but appeals per judgeship have grown by 450%.

FINAL REPORT, Submitted to the President and the Congress Pursuant to Pub. L. No. 105-119, at 14 (Dec. 18, 1998); see *Anderson* v. *Bessemer City*, 470 U.S. 564, 574-75 (1985)

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[18] JUDICIAL BUSINESS OF THE UNITED STATES: 1999 ANNUAL REPORT OF THE DIRECTOR 15 (Mar. 14, 2000).

[19] *Id.* at 16.



("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.").

Petitioner argues for de novo appellate review largely on the basis of unsupported attacks on federal district court judges. For example, petitioner contends (with no evidence) that district judges are "for the most part, less experienced and adept at handling the requisite legal questions." Pet. Br. 11. Petitioner refers – again, with no support – to the "inflamed passions" of federal "trial judges." *Id.* at 27.[20] These ad hominem attacks on members of the federal judiciary have no basis in fact and provide no basis for deciding the question presented.

Moreover, as this case illustrates, the district courts are at least as willing and able as their appellate counterparts to address punitive damages issues. In this case, petitioner sought, and was permitted, to file no fewer than six post-trial briefs in the district court with respect to the punitive damages award. On appeal, Cooper apparently had a less favorable view of the Ninth Circuit's ability to apply the *BMW* guideposts in satisfactory fashion, for it raised the excessiveness issue on appeal only as a cursory afterthought. Cooper devoted merely 5½ pages of its briefing (out of 95 pages in total) to the issue and did not mention it at oral argument. Cooper's own litigation strategy in this case belies its claim that the appellate courts are a more suitable forum for punitive damages review.

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[20] Petitioner's own amici do not share its cynical view. General Dynamics contends that "the vast majority of appellate courts have ignored or misapplied" *BMW*, providing little reason to give those courts a de novo role in excessiveness review. Gen. Dynamics Br. 2. Another amicus supports the competence of district courts, citing a district court decision to show that courts "have the experience and the access to information necessary to determine whether a particular dollar figure is or is not excessive * * *." Chamber Commerce Br. 12-13.

### B. Petitioner Would Create a Multipart Standard of Review.

There are other powerful practical reasons as well for an abuse of discretion standard. Excessiveness challenges ordinarily arise in the context of Rule 59 motions, where they are combined with other grounds for new trial, such as evidentiary questions, improper summations, and jury instructions. From a pragmatic standpoint, it makes little sense for an appellate court to follow petitioner's suggestion (Pet. Br. 26 n.19) of engaging in the awkward exercise of applying de novo review to the district court's order with respect to the *BMW* guideposts, while simultaneously applying abuse of discretion review to the *very same order* with respect to state-law excessiveness standards and other new trial issues under Rule 59. As petitioner's own amicus the Association of American Railroads states, "there is no reason to create multipart standards, where some questions are reviewed de novo and others for abuse of discretion." RR Br. 5. Indeed, the same portion of the district court's decision may provide a common predicate for the federal constitutional and state-law excessiveness questions. "[A] Rule 59 determination does not involve strictly or even primarily issues of the constitutionality of the verdict, and this Court has favored a single, unitary appellate standard of review that applies to the entirety of the district court's order." RR Br. 16. "[W]hen an issue implicates the substantial discretion of the district court, even though questions of law may arise, this Court has repeatedly held that the abuse-of-discretion standard is proper." *Id.* See, *e.g.*, *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 403, 405 (1990) (holding that "a unitary abuse-of-discretion standard" governs "all aspects of a Rule 11 proceeding" and rejecting proposal for a "three-tiered standard of review").



### C. There Is No Constitutional or Due Process Right to De Novo Review.

Petitioner fails to identify any principle of law that would require a standard more stringent than abuse of discretion review by appellate courts. Petitioner suggests that constitutional issues demand de novo review (Pet. Br. 18), but such review is certainly not required as a matter of due process. There is, after all, no due process right to appellate review at all – let alone to de novo appellate review. See, *e.g.*, *Pennsylvania* v. *Finley*, 481 U.S. 551, 555-58 (1987); *Abney* v. *United States*, 431 U.S. 651, 656 (1977); *District of Columbia* v. *Clawans*, 300 U.S. 617, 627 (1937); *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). "One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect." *Pittsburgh, Cincinnati & Chi. Ry.* v. *Backus*, 154 U.S. 421, 426-27 (1894).

Although *Honda Motor Co.* v. *Oberg* held that a state could not deny judicial review of the size of punitive awards altogether, it did not hold that such review was required to be performed by an appellate court rather than a trial court. Nor did it require that the review be de novo. The common-law tradition of extremely limited appellate review demonstrates that independent review by an appellate court cannot possibly be required by due process. *Haslip*, 499 U.S. at 17-18 ("[T]he common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted. Nothing in that Amendment's text or history indicates an intention on the part of its drafters to overturn the prevailing method."); *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 730 (1988) ("'If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'") (quoting *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922)).[21]

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[21] This Court originally held that the Seventh Amendment prevented federal courts from granting judgment as a matter of law to the losing party after a jury's verdict, even when there was no legally sufficient evidence to

This Court has steadfastly declined to use the Constitution to append specific new procedural devices to the traditional requirements of notice, a meaningful opportunity to be heard, and a neutral decisionmaker.[22] There is no warrant for enacting "a rigid constitutional code of procedural necessities." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985). Indeed, petitioner's topsy-turvy argument would produce greater procedural protections for civil defendants in cases involving simple money damages than for criminal defendants in cases where liberty or even life is at stake.[23]

In a wide variety of contexts, this Court has held that lower court rulings involving constitutional issues may permissibly

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support the verdict. *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364 (1913). Such a result was not thought to violate due process, and not until the fiction was developed of submitting the case to the jury while reserving a directed verdict motion did the Court hold that post-trial grant of judgment as a matter of law was permitted by the Seventh Amendment. *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935).

[22] See *TXO*, 509 U.S. at 465 ("While it is always helpful for trial judges to explain the basis for their rulings as thoroughly as is consistent with the efficient dispatch of their duties, we certainly are not prepared to characterize the trial judge's failure to articulate the basis for his denial of the motions for judgment notwithstanding the verdict and for remittitur as a constitutional violation."); *Haslip*, 499 U.S. at 23 n.11 (standard of clear and convincing evidence not required by due process); *Browning-Ferris*, 492 U.S. at 260 (the "Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties").

[23] In the criminal forfeiture context, this Court has held that the ultimate question of "whether a fine is constitutionally excessive" is subject to de novo review, *United States* v. *Bajakajian*, 524 U.S. 321, 336 n.10 (1998), but this Court has held that the Excessive Fines Clause does not apply at all to punitive damages. *Browning-Ferris*, 492 U.S. at 260. Instead, punitive damages are governed by the Seventh Amendment and the historical tradition of deferential judicial review. Further, in *Bajakajian*, this Court noted the need to defer to the district court's factual findings: "[t]he factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous." 524 U.S. at 336 n.10.



receive deferential appellate review. See *Maine* v. *Taylor*, 477 U.S. 131, 145 (1986) ("We note, however, that no broader review is authorized simply because this is a constitutional case"). For example, under the habeas statute, as amended by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1), state court decisions involving federal claims (including constitutional claims) are reviewed deferentially. This Court has explained that "a federal habeas court * * * should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams* v. *Warden*, 120 S. Ct. 1495, 1521 (2000). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 1522. See also *Ohio* v. *Robinette*, 519 U.S. 33, 39-40 (1996) (under Fourth Amendment, voluntariness is question of fact subject to deferential review, because "bright-line rule[s]" are inapplicable and Court has taken a "traditional contextual approach") (internal citation omitted); *Batson* v. *Kentucky*, 476 U.S. 79, 98 n.21 (1986) (deferential review of whether peremptory challenge exercised in violation of Equal Protection Clause); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. at 336 (O'Connor, J., joined by Blackmun, J.) ("This Court, like other appellate courts, has always applied the 'abuse of discretion' standard on review of a preliminary injunction," even in cases involving First and Fifth Amendment claims); *Hunter* v. *Underwood*, 471 U.S. 222, 229 (1985) (deferential review of findings of "legislative intent" animating unconstitutional state statute); *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1985) (deferential review of juror bias in capital case, even though "[t]he trial judge is of course applying some kind of legal standard to what he sees and hears"); *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983) (abuse of discretion governs decision to grant continuance, despite Sixth Amendment claim); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (applying abuse of discretion

review to preliminary injunction in First Amendment case).[24]

Contrary to petitioner's suggestion (Pet. Br. 16), legal determinations by district courts do not automatically receive de novo review. Where the district court's superior vantage point gives it special expertise, as in the case of punitive damages, its rulings often receive abuse of discretion review. For example, in *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 401-05 (1990), this Court held that, in the Rule 11 context, reviewing courts should defer to district courts' conclusions about substantial legal justification, even though such matters present issues of law. This Court explained that such rulings were "rooted in factual determinations" and that "the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11." *Id.* at 401-02.

In *Pierce* v. *Underwood*, 487 U.S. 552 (1988), this Court held that abuse of discretion was the proper standard of review of a district court's determination under the Equal Access to Justice Act that the position of the United States was "substantially justified." Even though the question was legal in nature, this Court explained that it would "turn upon not merely what was the law, but what was the evidence regarding the facts." *Id.* at 560. This Court also noted the need to avoid "requiring the court [of appeals] to undertake the unaccustomed task of reviewing the entire record." *Id.* Similarly, a court of appeals must apply an abuse of discretion standard when it reviews a trial court's decision to admit or exclude expert testimony under the factors of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579,

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[24] See also *Hernandez* v. *New York*, 500 U.S. 352, 363-70 (1991) (plurality opinion) (declining to extend *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), to peremptory challenges); *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989) (even in First Amendment context, "credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses'") (quoting *Bose*, 466 U.S. at 499-500)).



589 (1993);[25] to dismiss a case on grounds of forum non conveniens, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 257 (1981); to dismiss an in forma pauperis complaint on grounds of frivolousness, *Denton* v. *Hernandez*, 504 U.S. 25, 33 (1992); to dismiss a prosecution for violation of the Speedy Trial Act, *United States* v. *Taylor*, 487 U.S. 326, 335-36 (1988); to award attorney's fees under 42 U.S.C. § 1988, *Hensley* v. *Eckerhart*, 461 U.S. 424, 432, 436-37 (1983); to invoke collateral estoppel, to grant or deny intervention, to certify a class action, to issue a preliminary injunction or declaratory judgment, and to make a host of other decisions even when they ultimately rest on legal determinations. See generally 1 Steven Alan Childress & Martha S. Davis, FEDERAL STANDARDS OF REVIEW §§ 4.08-4.19 (3d ed. 1999); see also Brief for the United States in *Buford* v. *United States*, No. 99-9073 (arguing that a court of appeals should apply a deferential rather than de novo standard to a district court's legal determination that a defendant's prior sentences were not "related" within the meaning of Application Note 3 to Sentencing Guidelines § 4A1.2).[26]

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[25] See *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 138-39 (1999); see also *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 143 (1997) (reversing court of appeals' judgment that applied an "overly 'stringent' review" to trial court's *Daubert* ruling).

[26] *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991), is not to the contrary. There, this Court opined that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question." *Id.* at 233 (citation omitted). Moreover, issues of state law are not always reviewed de novo. This Court will usually "defer to the construction of a state statute given it by the lower federal courts * * * to reflect [the] belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); see also *McMillian* v. *Monroe County, Ala.*, 520 U.S. 781, 786 (1997) (where § 1983 claim hinges on whether sheriff is a "policy maker," as defined by state law, Court notes that it will "defer considerably to [Eleventh Circuit's] expertise in interpreting Alabama law").

For all these reasons, this Court should not depart from abuse of discretion as the proper standard for review of a district court's determination of an excessiveness challenge.

## III. PROPERLY CABINED, "DE NOVO" REVIEW WOULD AMOUNT TO THE SAME THING AS ABUSE OF DISCRETION.

Unless it were given an improperly expansive scope, a standard of "de novo" review would not reach appreciably different results from abuse of discretion review, and therefore provides no basis for upsetting the Ninth Circuit's judgment in this case. Correctly conceived, the question under de novo review ought to be whether the district court's judgment denying an excessiveness challenge is rational, drawing all reasonable factual inferences in its favor. As this Court explained in *Honda Motor Co.* v. *Oberg*, "[t]here may not be much practical difference between review that focuses on 'passion and prejudice,' 'gross excessiveness,' or whether the verdict was 'against the great weight of the evidence.' All of these may be rough equivalents of the standard this Court articulated in *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979) (whether 'no rational trier of fact could have' reached the same verdict)." 512 U.S. at 432 n.10. Petitioner itself assures this Court that it "does not suggest * * * that the appellate courts must somehow divine the exact amount of punitive damages necessary to punish and deter a defendant's misconduct." Pet. Br. 10.

This Court has articulated the "reasonableness" or "rational factfinder" standard in other punitive damages cases. *E.g.*, *Oberg*, 512 U.S. at 429 ("evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing"); *TXO*, 509 U.S. at 461 (examining what "the record evidence would support" and what "the jury could well have believed"); *id.* at 462 ("On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole



or in part, the lucrative stream of royalties that it had ceded to Alliance.").[27]

The "rational factfinder" test is an objective one that focuses on the record before the jury. It "does not permit a court to make its own determination of guilt or innocence," nor does it concern "how rationally the verdict was actually reached." *Jackson*, 443 U.S. at 319-20 n.13. "This familiar standard gives full play to the responsibility to the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," thus "imping[ing] upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Id.* at 319. Historically, remittiturs have been imposed according to the *maximum* amount that a reasonable jury could have awarded. Wright & Miller, *supra*, at § 2815 ("[R]eduction only to the highest amount that the jury could properly have awarded * * * is the only theory that has any reasonable claim of being consistent with the Seventh Amendment."); see also *Dimick*, 293 U.S. at 480-81.

Under this standard, all reasonable factual inferences must be drawn in favor of the jury's verdict and the district court's judgment. *E.g.*, *BMW*, 517 U.S. at 585 (assuming truth of jury's findings "[n]otwithstanding the evidence adduced by BMW"); *TXO*, 509 U.S. at 447 ("The jury verdict in respondents' favor, which has been affirmed by the Supreme Court of Appeals of

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[27] See also *Herrera* v. *Collins*, 506 U.S. 390, 402 (1993) (review under *Jackson* "does not focus on whether the trier of fact made the *correct*" decision, "but rather whether it made a *rational* decision"); Tr. of Oral Arg. in *Honda Motor Co.* v. *Oberg*, No. 93-644 (Apr. 20, 1994), 1994 U.S. Trans. LEXIS 150, at **13-14 (questioning by Justice O'Connor as to "why should the constitutionally mandated review be any more than is required in a criminal case" under "the *Jackson* standard," leading petitioner's counsel Andrew L. Frey to state: "I have no problem with that standard. That's what we would like to see the Court supply."); PLAC Br. 7 ("For purposes of the inquiry into constitutional excessiveness, the reviewing court assumes the jury acted 'rationally' in light of the evidence before it * * *.").

West Virginia, makes it appropriate to accept respondents' version of disputed issues of fact."); see also *Gasperini*, 518 U.S. at 434 ("We must give the benefit of every doubt to the judgment of the trial judge."); *id.* at 443 (Stevens, J., dissenting) ("mixed questions require courts to construe all record inferences in favor of the factfinder's decision"); *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996) (even under de novo standard, "a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers"); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (inferences from the facts must be "'viewed in the light most favorable to'" the nonmovant).[28]

In the end, therefore, a de novo standard would not be significantly different from an abuse of discretion standard, in practical effect, and would provide no basis for upsetting the Ninth Circuit's judgment.

## IV. THIS COURT SHOULD AFFIRM THE JUDGMENT REGARDLESS OF THE APPLICABLE STANDARD OF REVIEW.

There is overwhelming record evidence of the reasonableness of the punitive award in this case. The award would be sustained under any standard of appellate review.

Cooper had fair notice that its willful misconduct could subject it to punitive damages. Cooper passed off a touched-up photograph of Leatherman's product as its own; copied a drawing of Leatherman's tool and represented it as its own; permitted others to continue to publish the misleading Leatherman photograph despite a preliminary injunction; and created new marketing materials after the injunction was entered.

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[28] Even under de novo review, a court of appeals is not permitted to find facts itself under a corrected version of the law. *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713-14 (1986).



Cooper did all of this in order to sell an inferior tool. ER 594. Cooper knew very well that what it did was wrong. It stipulated to an injunction and did not appeal the jury's finding of passing off or willfulness. Under the Oregon Unlawful Trade Practices Act, a person found to have willfully used an unlawful trade practice in a suit instituted by the state may be penalized up to $25,000 *per violation*. Or. Rev. Stat. § 646.642(3) (1999). Willful violation of an injunction entered pursuant to the UTPA may be penalized $25,000 *per violation*. *Id.* § 646.642(1). In this case, thousands of copies of the advertising materials showing the Leatherman Tool were distributed by Cooper and its vendors. J.A. 32-45; ER 622-27, 1061-69.

The potential harm to Leatherman (and gain to Cooper) was substantial. Cooper's own internal documents reveal that it planned to capture 5% of Leatherman's business, estimated by Cooper to be $3 million for the first five years. But for Leatherman's prompt action, Cooper would have reaped this illicit gain. Charged in part to calculate "the sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future," J.A. 14, the jury properly returned an award commensurate with Cooper's expected gain and Leatherman's potential loss. Accordingly, the award in this case is reasonable under the logic of *TXO*, which upheld a ratio of 526 to 1 based on "the tremendous financial gains that TXO hoped to achieve" and "the amount of money *potentially* at stake," 509 U.S. at 461, 462 (plurality opinion), had the wrongdoer's scheme been allowed to unfold unchecked.

Moreover, despite the extreme brevity of Cooper's excessiveness argument in the court of appeals – and its failure to litigate the question of the appropriate standard of appellate review – the Ninth Circuit in fact found that the district court's decision to uphold the award was "*supported by the evidence.*" Pet. App. 3a (emphasis added). The court of appeals itself found that the misconduct "gave Cooper an unfair advantage by allowing it to use the sweat of Leatherman's efforts to obtain a 'mock-up' more cheaply, easily, and quickly than if it had started

from scratch or waited until samples of its own product were ready." *Id.* at 4a. "Additionally, there was evidence that Cooper did not act promptly to remedy the problem even after an injunction issued, which suggests an indifference to legal consequences." *Id.*

Given Cooper's failure to litigate the standard of review issue in the Ninth Circuit, it is not surprising that the court of appeals framed its holding in the familiar "abuse of discretion" language. But it is clear that the district court's judgment would be affirmed under any standard of review. Indeed, it would be inequitable in this case to reward Cooper with a remand to the Ninth Circuit for another bite at the apple when it failed even to present the standard of review issue to the Ninth Circuit in its first appeal. The judgment below should be affirmed because it is plain, under any standard of appellate review, that the district court properly entered judgment for Leatherman.

## CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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